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Service:

IN THE SUPREME COURT OF THE STATE OF ALASKA

J.P. and S.P. (Foster Parents),

Appellant,

v.

State of Alaska, DHSS, OCS, G.C. (Mother), W.F. (Father), J.F. (Child), and Sun'aq Tribe of Kodiak,

Appellees.

Supreme Court No. S-18107

Trial Case No. 3AN-17-00032CN

CERTIFICATE OF SERVICE

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Arial 12.5 point.

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MOTHER'S BRIEF IN RESPONSE TO MEMORANDUM OF FOSTER PARENTS

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ISSUES PRESENTED FOR REVIEW

J.P. and S.P., the former foster parents for J.F., lodged a "Notice of Appeal/Original Application" with this court following a state court order transferring jurisdiction of this child welfare case to the Sun'aq Tribe of Kodiak. This court has directed the former foster parents and the parties to the state court proceeding (the mother, G.C., the father, W.F., the Office of Children's Services (OCS), the guardian ad litem, and the Sun'aq Tribe of Kodiak) to brief two questions:

1. Were the former foster parents a party to the state court proceedings?

2. If the former foster parents were a party to the state court proceedings, does the public interest exception to the mootness doctrine apply?

STATEMENT OF THE CASE

OCS filed a petition to adjudicate J.F. a child in need of aid in 2017. [App'x 1-14][1] J.F. is an Indian child, and pursuant to the Indian Child Welfare Act (ICWA), OCS notified Tangirnaq Native Village of the state court proceedings. [App'x 83-90] In March 2021, the Sun'aq Tribe of Kodiak filed a notice of intervention in the state court case[2] [App'x 48-52], and in April, the tribe petitioned the state court to

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[1] G.C. has attached an appendix consisting of selected state court pleadings, transcripts, and orders to this brief.

[2] Attached to the notice of intervention was a letter from Tangirnaq Native Village appointing Sun'aq Tribe of Kodiak as the Designated Tribal Agent to ensure compliance with ICWA. [App'x 51] The notice also included a letter confirming W.F.'s status as an enrolled member of Tangirnaq Native Village. [App'x 52] *See* 25 CFR § 23.12 (providing that tribe may designate an agent other than tribal chairman for service of notice under ICWA); 25 CFR § 23.108 (stating that tribe determines membership); 25 CFR § 23.109 (stating that tribes must be given opportunity to

transfer jurisdiction over J.F. to its tribal court. [App'x 55-59] The guardian ad litem opposed transfer of jurisdiction [App'x 63-72], but both G.C. and W.F. supported the transfer. [App'x 59-62]

On May 26, the trial court granted the tribe's petition for transfer, ordering the transfer "pending filing of a notice from Tribal Court accepting jurisdiction." [App'x 133] The tribal court distributed its notice accepting jurisdiction on June 4. [App'x 134-35] The same day, the former foster parents filed a motion to stay the state court proceedings; G.C. and W.F. moved to strike that pleading, as the former foster parents had not intervened in the case. [App'x 136-45, 146-49, 155] Three days later, the former foster parents filed a motion to reconsider the state court order transferring jurisdiction to the tribe.[3] [App'x 150-54] Without ruling on G.C.'s motion to strike, the state court denied the motion to reconsider. [App'x 165-66, 167]

STANDARDS OF REVIEW

Both the questions identified by this court present questions of law, which this court reviews de novo.

ARGUMENT

I. Because They Did Not Move to Fully Intervene in the State Court Proceeding, the Former Foster Parents Have No Right of Appeal.

When OCS petitioned to adjudicate J.F. a child in need of aid, the Child

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determine which tribe should be designated child's tribe when child is Indian child through more than one tribe).

[3] OCS filed a non-opposition to the motion for reconsideration, which included an opposition to G.C.'s motion to strike; the guardian ad litem joined OCS's pleading. [App'x 156-63, 164]

in Need of Aid Rules of Procedure defined the parties to that case to include "the child, the parents, the guardian, the guardian ad litem, the Department, an Indian custodian who has intervened, an Indian child's tribe which has intervened, and any other person who has been allowed to intervene by the court."[4] Although individuals who serve as a resource family have certain rights in CINA proceedings,[5] they are not parties to the case unless they have "been allowed to intervene by the court."[6] Because the state court did not allow the former foster parents to intervene in the state case, they were not a party, and they may not maintain an appeal of the state court order transferring jurisdiction to the tribal court.

This court has explained that intervention by a foster parent is "the rare exception rather than the rule."[7] Foster parent intervention contravenes "the goals of the CINA statutes" and "risks delay and complication, distracting from OCS's mandate of family reunification."[8] A request to intervene by a foster parent is governed by Civil Rule 24's provision regarding permissive intervention,[9] which requires any person seeking to intervene to "serve a motion to intervene upon the parties as provided in

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[4] Alaska CINA R. P. 2(*l*).

[5] *See, e.g.*, ALASKA'S RESOURCE FAMILY HANDBOOK, State, Dep't of Health & Soc. Servs., Office of Children's Servs. (rev. Nov. 2016); Alaska CINA R. P. 22(b).

[6] *See State, Dep't of Health & Soc. Servs., Office of Children's Servs. v. Zander B.*, 474 P.3d 1153, 1164 (Alaska 2020).

[7] *Id.*

[8] *Id.* at 1163-64.

[9] *Id.* at 1163.

[Civil] Rule 5."[10] A motion to intervene shall state the grounds for intervention and include "a pleading setting forth the claim or defense for which intervention is sought."[11]

Here, the former foster parents never filed a motion to intervene, and the trial court never issued an order allowing them to fully intervene such that they became a party to the case. Instead, shortly before a placement review hearing, the former foster parents appeared at a trial call regarding the placement review. [App'x 15-32] At that hearing, the former foster parents stated their "intent[] to file a motion to intervene in the proceeding" and that "[t]he subject matter can be limited to the placement issue." [App'x 19-20] The former foster parents indicated they were seeking a continuance of the placement review hearing. [App'x 20]

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[10] Alaska R. Civ. P. 24(c).

[11] *Id.* In its brief to this court, the former foster parents do not discuss the rules defining the parties to a CINA case, focusing instead on the issue of standing. [JP and SP Br. 6-8] But before the state trial court could consider an objection to the former foster parents' standing, they were required to file a motion to intervene. *See Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010) (explaining standing is "a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions" and that "fundamental question raised by objection to standing is whether the litigant is a proper party to seek adjudication of a particular issue" (internal quotation marks omitted)).

This court should also reject the former foster parents' suggestion that this court apply its jurisprudence regarding the standing of nonparents to litigate civil custody cases to the instant case. [JP and SP Br. 6-7] The former foster parents did not institute a civil custody case implicating that jurisprudence and instead sought to participate in an ongoing CINA case. Such participation is governed by the court rules applicable to CINA cases and the jurisprudence interpreting those rules. *See, e.g.*, *Zander B.*, 474 P.3d at 1163-64.

Although the state court stated that it did not think there would be "any objection to a limited intervention, necessarily," G.C. objected to a motion to continue "from people who are not parties to the case," and W.F. joined G.C.'s objection.[12] [App'x 21, 25] OCS stated that it did not oppose the former foster parents' entry as "a limited entry of appearance for purposes of litigating the placement issue." [App'x 18-19]

After the state court set a briefing schedule on the motion to continue, the former foster parents clarified their role in the case: "I want to make sure that there is a[n] agreement among the parties that I can intervene for the limited purpose of the placement hearing, and – you know, because I will absolutely follow that up with a written motion if necessary[.]" [App'x 27] The court stated that they "could file simultaneously, a notice of limited appearance, but you (indiscernible) a court to file a – the – for a continuance of the hearing currently set on the 16th."[13] [App'x 28]

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[12] In their brief to this court, the former foster parents state that they filed their written entry of appearance and that "there were no contemporaneous written objections filed." [JP and SP Br. 7] But as explained above, a foster placement is not a party to a case absent a grant of intervention from the trial court. Because the former foster parents' entry of appearance did not include a motion to intervene, there was nothing to which the parties to the case could object.

[13] The state court also ordered that the former foster parents could appear and participate at a previously scheduled deposition later that week. [App'x 29] G.C. opposed participation at the deposition because "there has been no formal motion to intervene," noting that she "would file strenuous objection" to any such motion. [App'x 29] The court affirmed its decision to allow them to participate, but it noted the limited nature of its ruling:

> I'm going to authorize the – her to participate in the deposition and ask questions just so then the other parties – her limited entry of appearance has been made orally to the Court. That's sufficient for now. She needs

Before the rescheduled placement review hearing,[14] the tribe petitioned the state court to transfer jurisdiction. [App'x 55-58] Although the state court had only permitted the former foster parents to participate at the placement review hearing and without filing a motion to intervene, the former foster parents filed an opposition to that request.[15] [App'x 73-108] Both parents responded to the opposition to the petition to transfer custody, and G.C. specifically opposed the former foster parents' participation. [App'x 109-23, 124-32] The state court granted the tribe's request to transfer jurisdiction, and while it did not explicitly rule on the former foster parents' status in the case, it stated its transfer order was based on "the points cogently raised in the mother's reply brief." [App'x 133]

That is, contrary to their brief, the former foster parents never sought full intervention in the CINA proceeding [JP and SP Br. 7], and the state court did not allow them "to participate fully in the permanency proceedings with their counsel" thereby granting them "de facto permissive party status."[16] [JP and SP Br. 8] Because

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> to follow it up with a formal entry so everyone has her service and contact information[.]

[App'x 30]

[14] It is unclear whether the state court received a motion to continue from the former foster parents, as the state clerk's office issued a deficiency motion upon filing stating they were not a party. [App'x 32-47] G.C., however, filed a limited nonopposition to a continuance of the placement review hearing, and it appears the hearing was continued on the record in a subsequent proceeding. [App'x 53]

[15] The guardian ad litem also filed an objection to the tribe's petition. [App'x 63-72]

[16] Indeed, given the guardian ad litem's objection to the transfer of jurisdiction, it is questionable whether intervention would have been granted had the

the former foster parents sought to participate in the state court case only for the purposes of placement, they may not maintain an appeal of the state court order transferring jurisdiction to the tribal court.

II. This Court Should Not Review the Moot State Court Order Transferring Jurisdiction to the Tribal Court.

The former foster parents are seeking review of the state court order transferring jurisdiction to the tribal court. But as this court recognized, "[b]y the time they appealed on 6/11/21, jurisdiction had already passed to the tribal court."[17] [App'x] The order is therefore moot, and this court should not apply the public interest exception to the mootness doctrine.

This court may apply the public interest exception and review an otherwise moot order when (1) the disputed issues are capable of repetition; (2)

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former foster parents filed an appropriate motion. *See Zander B.*, 474 P.3d at 1163 ("It is understandable that foster parents would want to advocate in the CINA case for what they see as a child's best interests, especially if their view differs from OCS's. But as OCS points out, not only is the agency itself tasked with pursuing the child's best interests, but the child's best interests may be represented separately by a GAL (as they are here), who is charged with bringing an independent perspective to OCS's decisions on placement and other matters.").

[17] Order, *J.P. and S.P. (Foster Parents) v. State, DHSS, OCS, et al.*, S-18107, at 4 (July 9, 2021). In its explanatory order regarding the former foster placement's motion for stay, this court noted that "it would behoove the superior court in the future to fashion any order transferring jurisdiction to tribal court in a way that does not take immediate or near-immediate effect, so as not to prejudice the ability of parties who may have objected to transfer to seek a stay and appellate relief from this court." *See id.* at 5 n.6. The tribe did not issue its order accepting jurisdiction until nine days after the state court granted its petition. [App'x 134-35] While the state court could have written its order to provide a clear timeline, there was sufficient time for a party to seek a stay and/or appellate relief of the state court order. The former foster parents, however, waited nine days after the state court issued its order to file their motion to stay. [App'x 136-45]

application of the mootness doctrine may cause review of the issues to be repeatedly circumvented; and (3) the issues are so important to the public interest as to justify overriding the mootness doctrine.[18] None of these factors is established in this case.

The question whether the state court erred in transferring jurisdiction to the tribal court is an inquiry rooted in the specific facts of this case. While transfers of jurisdiction will occur in other cases, the question whether this court erred in transferring jurisdiction over J.F. to the tribe is not one that is capable of repetition.[19] Nor will application of the mootness doctrine cause review of transfer questions to be circumvented. A party who objects to the transfer of jurisdiction can appeal such an order; and it can timely request an emergency stay of the order to permit that appeal

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[18] *See, e.g.*, *In the Matter of the Necessity for the Hospitalization of Naomi B.*, 435 P.3d 918, 927 (Alaska 2019).

[19] *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,822 (June 14, 2016) (stating that state courts retain ability to determine "good cause" to deny transfer "based on the *specific facts of a particular case*, so long as they do not base their good cause finding on one or more" prohibited considerations") (emphasis added).

The former foster placement's argument about the issue presented by its appeal is based on a misunderstanding of the record below. The tribe did not "unilaterally claim[] jurisdiction over a child not a member of the tribe nor eligible for membership." [JP and SP Br. 9] Rather, the tribe intervened only after Tangirnaq Native Village appointed the tribe as its representative in this case. For this reason, this court should reject the former foster parents' argument that orders issued by the Sun'aq Tribal Court are void and that their appeal is not moot. [JP and SP Br. 2-5] To the extent the former foster parents are also arguing that valid tribal orders should not be afforded full faith and credit [JP and SP Br. 2-4], they did not ask the trial court to deny enforcement of that order on those grounds. *See* Order, *J.P. and S.P. (Foster Parents) v. State, DHSS, OCS, et al.*, S-18107, at 5-6 (July 9, 2021).

to be heard before jurisdiction is transferred.[20]

Finally, while the transfer order is of obvious importance to the former foster parents, it is not the type of order that justifies overriding the mootness doctrine. The Indian Child Welfare Act presumes that tribal courts are in the best position to address the welfare of tribal children,[21] and transfers of jurisdiction, including the one here, are routine orders that "preserv[e] the integrity of Tribes as self-governing, sovereign entities and ensur[e] that Tribes could survive both culturally and politically."[22] Indeed, none of the other parties – including the guardian ad litem, who opposed transfer in the state court – sought review of the transfer order.[23]

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[20] For this reason, the former foster parents' contention that the superior court's order "did not allow time for an appeal" is incorrect. [JP and SP Br. 10] *See supra* note 17.

[21] *See, e.g.*, Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,822 (June 14, 2016).

[22] *Id.* at 38,781 (quoting 124 Cong. Rec. H38, 102); *id. at* 38,821 (explaining that Congress intended "good cause" exception to transfer petitions to be "limited and animated by the Federal policy to protect the rights of the Indian child, parents, and Tribe, which can often best be accomplished by the Tribal court" and noting that "[e]xceptions cannot be construed in a manner that would swallow the rule"); *see also* 25 U.S.C. § 1911(b) (stating state court "*shall* transfer such proceeding to the jurisdiction of the tribe" if there is not good cause to the contrary); Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,824 (June 14, 2016) ("Congress directed that State courts "shall transfer" proceedings to the jurisdiction of the Tribe unless specified conditions were met. This indicates that Congress intended transfer to be the general rule, not the exception.").

[23] The former foster parents' argument about the importance of the issues at stake misunderstands the nature of the transfer order. [JP and SP Br. 11] Petitions to transfer a case to tribal court raise questions of jurisdiction and do not implicate "best interests" considerations. *Id.* at 38,827 ("The final rule does not include a 'best interests' consideration, but does provide other guidance. . . . In general, the transfer determination should focus on what jurisdiction is best positioned to hear the case."); *see also id.* ("However, the 'good cause' determination whether to deny transfer to

In its brief, the guardian ad litem asserts that the public interest exception "should apply generally to orders transferring jurisdiction to tribal courts where the issue is preserved below and does not implicate prohibited considerations." [GAL Br. 8] While G.C. agrees that "orders [] transferring child protection matters to tribal jurisdiction cannot be relegated to a basket of untouchable, unreviewable trial court orders" [GAL Br. 9], the litigation in this case does not suggest this is a risk. Here, no objecting party asked the state court to delay an order granting transfer in its written opposition to the tribe's petition, and the parties had sufficient time to seek a stay and/or file a notice of appeal on an expedited basis before the tribe accepted jurisdiction. The proceedings below do not provide a compelling basis for this court to deviate from its standard practice of declining to review moot orders.

CONCLUSION

G.C. respectfully requests this court reject or dismiss the notice of appeal filed by the former foster placement.

SIGNED on August 3, 2021, at Anchorage, Alaska.

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Tribal court should address which court will adjudicate the child custody proceeding, not the anticipated outcome of that proceeding."). Moreover, state courts hearing such petitions are expressly prohibited from considering whether "transfer could affect the placement of the child" or the child's "cultural connections with the Tribe or its reservation." 25 CFR § 23.118(c).